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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LYNDON H. LAROUCHE, JR.,
WILLIAM WERTZ, EDWARD SPANNAUS,
MICHAEL BILLINGTON, DENNIS SMALL,
PAUL GREENBERG and JOYCE RUBINSTEIN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seven defendants were denied their rights to a fair trial, to due process of law, to the assistance of counsel and to prepare and present defenses, in violation of the Fifth and Sixth Amendments to the Constitution of the United States, where they were forced to trial over vigorous protest 38 days after the return of a 52-page, two conspiracy, 13-count indictment which resulted from an extensive four-and-one-half year nationwide investigation and which alleged 121 overt acts citing 14 unindicted co-conspirators, and where the government listed 53 trial witnesses and turned over a massive quantity of discovery materials during the time between indictment and trial.

2. Whether the peremptory selection of a jury by the court after denying defendants' motions seeking selection of a fair and impartial jury violated the Sixth Amendment to the Constitution of the United States where despite presentation of 65 representative newspaper articles circulated in the Alexandria Division showing prejudicial pretrial publicity of the most intense nature and animus toward defendants, the highly controversial presence of the international headquarters of defendants' principal organizations within the Alexandria Division, the known hostility between defendants and federal agencies and officials and the very high percentage of federal government employees in the jury lists, a jury was chosen by the judge in less than two hours; there was no probing for prejudice; general questions were asked of the array; eight of the jurors were never asked an individual question and never answered any question except by silence; a high percentage of the jury panel and the sitting jurors were directly employed by the federal government, or dependents of government employees; employees of the FBI, the U.S. Department of Justice and the wife of a retired FBI agent were not excused for cause; and where it was not discovered until after the trial that the jury foreman's job assignment

included liaison with a federal agency which defendants had vigorously and publicly attacked.

3. Whether the pretrial entry of an order limiting the presentation of critical evidence by defendants at trial and denying discovery of related evidence in the possession of the government contravened defendants' right to prepare and present defenses, in violation of the Fifth and Sixth Amendments, where defendants received the government's motion *in limine* on November 9, 1989 without prior notice such a motion would be filed; were forced to argue the motion the next day along with many other motions; and where the court granted the government's motion in all significant respects that same day, only 11 days before trial, in an order excluding, primarily on Rule 403 grounds, evidence that would support defendants' stated defense that the U.S. government itself was responsible for their failure to repay loans for which they were indicted while simultaneously denying all of defendants' discovery requests aimed at obtaining evidence to prove this defense.

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. Sec. 3161(c)(2)

Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed *pro se*.

Federal Rule of Evidence 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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OPINION IN THE CASE

The opinion of the Court of Appeals is reported at 896 F.2d 815. (A. 1) The rulings and opinions of the District Court are unreported, however selected rulings are reproduced in the Appendix. (A. 58, 240)

JURISDICTIONAL GROUNDS IN THIS COURT

The order and opinion of the Court of Appeals sought to be reviewed were entered on January 22, 1990. (A. 1) An order denying petitioners' timely petition for rehearing with

suggestion for rehearing *in banc* was entered on February 16, 1990. (A. 37) 28 U.S.C. §1254(1) is the statutory provision that confers jurisdiction on this Court to review this case by writ of *certiorari*.

STATEMENT OF THE CASE

The critical facts presented here demonstrate that the procedure followed below was so distorted, biased and unfair as to negate even the appearance of justice or the protection of the Petitioners' fundamental constitutional rights. The defendants were indicted in a forum nationally known for its "rocket docket," were rushed to trial despite their protestations that they could not possibly be prepared in the time allotted, had a jury chosen in perfunctory fashion despite extensive hostile pretrial publicity with no effort to uncover prejudice, and were denied the right to present their defense to the jury by a pretrial *in limine* order. While each of the three issues raised by the Petitioners are significant in and of themselves, in combination they show that there was never any intention to conduct a fair trial. A full explanation of what occurred below illustrates the magnitude of the injustice[1] and the nature of the threat to the Constitution presented when a controversial political group is brought to trial in a manner that makes a mockery of the right to a fair trial.

I. The Rush to Trial

On Friday, October 14, 1988, a federal grand jury sitting in Alexandria, Virginia returned a 52-page indictment against

[1] This gross miscarriage of justice resulted in prominent international jurists, as *amici*, raising the question below: "If defendants tried in a United States court are denied important rights for a fair trial by an impartial jury, this in turn constitutes a setback for the evolution of human rights in the entire world." *Amicus Brief of Prof. Dr. Richard Klecatsky and Prof. Dr. Wolfgang Waldstein of Austria*, filed May 25, 1989 in the Fourth Circuit.

seven individuals which contained 13 counts, alleged 121 separate overt acts and named 14 unindicted co-conspirators in two separate conspiracies. The first 12 counts charged a mail fraud conspiracy and 11 counts of mail fraud in connection with unpaid loans to three corporations, and the final count charged a conspiracy to impede the IRS.

The principal defendant, Lyndon H. LaRouche, Jr., was charged in all 13 counts and was the sole defendant charged in count 13. He is one of the most controversial public figures of the previous twenty years, a subject of continuous notoriety and frequent publicity who leads a political movement that has promoted thousands of candidates for public office across the nation. At the time of the indictment, LaRouche was a candidate for President of the United States, and was on the ballot in twenty states in the election set for November 1988. LaRouche's presence in Leesburg, Virginia, which is within the Alexandria Division of the district court, was a further source of intense local concern, opposition and prejudicial publicity.

The defendants were the target of a nationwide federal investigation and associated grand jury inquiries, one of which led to this indictment. The investigation was coordinated by the U.S. Department of Justice in Washington, D.C. from at least October 1984. It resulted in earlier indictments in Boston, Massachusetts of 19 defendants, including three of the defendants here, with trial in that case beginning on December 17, 1987, after 12 days of jury selection. That trial ended in mistrial on May 4, 1988, with the *Boston Herald* reporting that jurors interviewed said they had unanimously agreed all defendants were "innocent of all charges." The district court in Boston found "systemic and institutional prosecutorial misconduct" surrounding the case, but denied defendants' motions to dismiss, and a new trial was scheduled for January 3, 1989. It was in the wake of these events that a grand jury,

concluding a two-year investigation, returned the present indictment.

Three days after the indictment, on Monday, October 17, before two defendants had secured counsel, the district court arraigned all defendants and set a schedule for motions and a trial date which was strictly enforced. Defendants were given until November 7 to prepare and file motions, with argument set for November 10. Trial began November 21, despite vigorously asserted motions for additional time for preparation as well as an extraordinary application to the Fourth Circuit to mandate additional time. The trial was a mere 35 calendar days after arraignment, with only 31 days having passed between the day the last defendant secured counsel and the date of trial, one day more than the 30-day period within which no trial may commence without written consent of the defendant under the Speedy Trial Act, 18 U.S.C. §3161(c)(2).

The government conducted intensive multi-agency and multi-jurisdictional investigations with significant attendant publicity for four-and-a-half years before this indictment. The Alexandria investigation included two years of grand jury presentations and hundreds of FBI, Secret Service and IRS interviews with contributors, lenders and others across the nation. As part of the investigation, approximately 1.5 million documents, including current loan records, were seized with great fanfare in a 400-agent search executed on October 6, 1986, in Leesburg, Virginia.

Despite what the courts below stated, the Boston trial had not prepared counsel or defendants to defend these charges. Three defendants in Boston were also indicted in Alexandria, and two of the three, including Mr. LaRouche, had been charged only with conspiracy to obstruct justice, a charge that was not related in any way to the Alexandria indictment. The third common defendant, Michael Billington,

was severed from the Boston case before trial. Three lawyers in the present case represented defendants in Boston, but none of these three represented a defendant charged with fraud in Boston, and only one represented the same defendant in both cases.

Furthermore, the charges and evidence in Boston were significantly different from this case. The primary charges in Boston were credit card fraud and obstruction of justice, as opposed to loan fraud in Alexandria. Of 33 witnesses in Boston, only four testified here, and their testimony dealt with different charges and facts. Of the 10 lender-witnesses out of 53 witnesses listed by the government in Alexandria, three were listed in Boston as possible government witnesses, but none had been called there. Of the extensive discovery material and proposed exhibits turned over in Alexandria, only one exhibit had been introduced in Boston. In fact, in its opposition to defendants' motion to transfer, the government argued below that the Boston case was "quite distinct as to defendants, charges and nature of the schemes . . . [there will be] no duplication of efforts." In denying transfer, the court found the cases were different. No litigation or other activity prior to this indictment prepared counsel or defendants for this trial.

Most defendants were involved in the final weeks of a presidential campaign. They had, suddenly, in addition to campaigning to direct their attention to obtaining counsel and commencing preparation for an imminent major criminal prosecution.

When the indictment in Alexandria was received, three lay persons assisting the defense immediately began to make a comparison of the allegations in the indictment with the record in Boston to find common elements. The Alexandria indictment represented forum shopping, defendants knew the reputation of the Alexandria court as a "rocket docket," and

believed Boston the proper forum. Over a three-day period, they rushed to prepare a 35-page motion to transfer the case to Boston with a 98-page analysis attached. This was reviewed by counsel for several defendants and filed on October 17 before all defendants had counsel. If granted, this motion would have obviated the November 21 trial date. It was denied on October 21.

The defense hurriedly prepared and filed 28 motions in the 21 days afforded by the court's schedule, filing four in advance of the deadline. A misjoinder motion filed November 2 with a lengthy supporting memo was denied November 4. Of 23 defense motions set for hearing on November 10, argument was allowed on only eight. No argument was allowed on a 62-page motion for exculpatory evidence itemizing 182 *Brady* requests supported by a 41-page memorandum of law.

Despite the intense pretrial publicity surrounding these defendants, demonstrated in part by a motion supported by 65 representative newspapers articles, no argument was allowed on any of the jury selection motions. Of the eight motions for which argument was allowed, six were on suppression issues, some of which were similar to motions the Boston court had held lengthy evidentiary hearings on. A written order denying all 23 defense motions was signed November 10.

In addition to motion work, preparation for trial required defendants to develop and seek agreement on defense strategies, plan procedures for preparation, agree—where possible—on work assignments, and prepare defenses to the allegations in the 52-page, 121 overt act indictment. The defense had to consider potential testimony by 53 witnesses and 14 unindicted co-conspirators listed by the government and determine who to try to interview among government witnesses. Investigation, interviews and analysis of potential de-

fense witnesses, including defendants themselves was required. They also had to review the nine file drawers of Rule 16 documents, 107 audio and six video tapes with scores of hours of listening time, 1,500 pages of *Jencks* material and 693 trial exhibits that were provided to the defense by the government shortly before trial, consider their significance, and find rebuttal evidence. At the same time, counsel had to prepare for jury selection, plan opening statements, and establish means of coordinating defendants and lawyers in order to effectively allocate tasks during trial.

Defendants first sought transfer of the case to Boston, which would have avoided the premature trial. Four days after arraignment, the likely need for more time to prepare was raised to the Court by counsel for Mr. LaRouche. On November 4, three days before all motions were due, the defense vigorously requested a continuance, specifying tasks essential for an adequate defense. (A. 47) Neither the court nor the government ever expressed any reason, need, justification or public interest to be served by such a rush to trial. While the Court of Appeals referred to an alleged conflict with the Boston retrial date, all parties knew, and the district court was made aware, that that trial would not go forward on that date. Early efforts to secure a continuance having failed, a writ of *mandamus* was sought from the Court of Appeals. It was denied on November 16. A renewed motion for continuance, with supporting affidavits, was also denied by the district court. (A. 60-105)

In the affidavits, each defense attorney expressed his inability to effectively represent his client without additional time to prepare. Odin Anderson, counsel for Mr. LaRouche, who also represented him in the Boston case, stated that he "was quite overwhelmed," "surprised totally by the specifics" of the indictment, that as of November 10, he had spent his "entire time virtually in preparation of motions" and "[it is] impossible to adequately prepare for trial." Attorney Edwin

Williams said he was "unable to provide effective assistance." Attorney William Moffitt said there was "no way [he could provide] effective assistance . . . [that] conviction is inevitable . . . as a result of time pressure." Attorney Kenly Webster, who was not retained until October 21, four days after arraignment, said he had been unable to interview witnesses, or even his client adequately. Attorney Brian Gettings, who served for six years as U.S. Attorney in the Eastern District of Virginia, said he was "stunned by this [trial] date," "no defense counsel could be prepared to go to trial."

In response the district court replied: "I really don't want to hear anymore . . . It's a lament, and the wailing and moaning . . . has gone on as long as I am going to hear it. You are big men . . . I will accept that this is going to be a trial under adversity for you, but I am not going to hear anymore wailing and moaning . . . about why I can't be ready for trial." (A. 107-108) When the case was called on November 21, all defense counsel announced "not ready." The district court ignored this and commenced the trial.

Injury arising from the inability to adequately prepare a defense and of counsel to effectively assist defendants is clear throughout the trial record. Specific deficiencies and errors of defense counsel were detailed for the Court of Appeals below. *See*, Petitioners' Fourth Circuit Appeal Brief, p. 15-17. Due to time constraints, the defense was unable to effectively cross examine prosecution witnesses, to find, interview and present witnesses for the defense, to locate, analyze and present documentary evidence, to thoroughly prepare their expert witness, to prepare defendants to testify, to prepare adequate opening statements, to avoid mistakes from ignorance and to make closing arguments on a well-presented record.

A costly error in an opening statement was made by very experienced counsel through ignorance. (*Id.* at p. 16) In

addition, the defense discovered after the trial that a lead government witness who gave emotional and damaging testimony that she was not repaid as promised by a defendant, had herself extended the time for repayment beyond the trial date. Government counsel apparently knew this. The jury never learned of it.

II. The Failure to Select a Fair and Impartial Jury.

The district court was repeatedly informed before jury selection that the case involved extremely controversial defendants. Two weeks before trial, the district court was made aware of intensive, protracted, highly prejudicial pretrial publicity which saturated the Alexandria Division for years preceding the jury selection. Defendants presented summaries of 65 representative articles appearing in the *Washington Post*, *Washington Times*, *New York Times*, *Richmond Times-Dispatch*, *Fairfax Journal* and other newspapers circulated in the Alexandria Division during the four years preceding the trial.

Highlighted in the stories were statements about the defendants, including: "anti-Semitic leader"; "political cults"; "armed and dangerous"; "small-time Hitler"; "death threat"; "violent prone"; "Suspect in Palme death"; "raises millions, assets $5,000"; "lavish lifestyle"; "extensive nationwide pattern of fraud"; "followers indicted"; "LaRouche Shredding—convincing evidence of destruction of documents"; "many investigations of Lyndon LaRouche"; "Dialing for Dollars . . . phone fraud"; "Millions funnelled to LaRouche"; "Inside Weird World of Lyndon LaRouche"; "burning subpoenaed papers"; "bilking elderly"; "Trail of Suffering Laid to Lyndon LaRouche"; "rivers of cash"; "grievous human suffering"; "cold, callous, cynical schemes"; "hate Merchants." Similar

reporting occurred regularly on local radio, T.V. and in national and Washington-area magazines.

Many of the stories described alleged conduct occurring in the Alexandria Division. Some were devoted entirely to reporting extreme tensions and hostility between defendants and the Loudoun County community from which the jury was, in part, to be drawn. Illustrative of the types of statements included in those articles are: "paramilitary indoctrination center" in Loudoun, Virginia; "LaRouche Arouses Fear in Virginia"; residents in Loudoun say they're "afraid of these people"; Loudoun residents "afraid to speak mind at public meeting"; "hundreds in Loudoun assisted investigation" of defendant organizations; "Big Black Cloud May Leave" [referring to defendant's moving from Loudoun County]; "Leesburg wants to get rid of him"; "Loudoun County Arrests" of 16 associates of LaRouche; "LaRouche indicted . . . 19 years of investigation"; "Neo-Nazi"; "jubilation in Leesburg . . . slapping each other on the back . . . going crazy" [over the Boston indictment of LaRouche]; "Loudoun Acts to Oust LaRouche."

In the face of such pervasive and highly prejudicial pretrial publicity, the trial court, after excusing 28 of 75 in the array for hardship without requiring any explanation, began jury selection by describing the indictment in barely one hundred words. Without identifying defendants in any way except by name, it told prospective jurors "the defendants in this case have been in the publicity." It then asked the array "whether anything you may have read or heard or seen has caused you to form any adverse opinion of these defendants or about their guilt or innocence in this case." Without any further background, seven of 47 prospective jurors, in the presence of all, said they had an adverse opinion and were excused. (A. 116-118) The question was never asked again. A motion to discharge the array for pollution based on this was denied, and the remaining jurors were not even asked

whether they were affected by the seven persons who admitted their prejudice in open court.

In its second question, the court asked the remaining 40 jurors whether any had read or heard or seen anything about "this case." (A. 118) The 22 who remained silent, including eight of the jurors who served, were never asked another question about pretrial publicity. The slightest effort by the court to probe would clearly have shown they knew about the case or the defendants, particularly Mr. LaRouche. However, the manner of the court's questioning caused them not to answer. Of the nine questions by the court to the panel, six elicited no response, including whether any prospective jurors had ever been "victim of a crime or participated in a criminal case or in any other capacity?" (A. 146) For none to have been a crime victim or have some contact with criminal proceedings was a near statistical impossibility. Yet the district court made no further inquiry.

On the day before jury selection, November 20, 1988, the *Washington Post* carried a lengthy story, with a picture of Lyndon LaRouche, reporting an alleged "34 Million Dollar Fraud." It described the frustrations of the Boston trial, blaming alleged tactics of defendants, and concluded that the court was "forced to declare a mistrial." Five prospective jurors who acknowledged reading the story were not questioned about what they remembered from the story, and were not excused.

The defendants tried diligently to secure a fair jury selection process. They notified the court of the intense prejudice created by hostile pretrial publicity, of the high level of activity and visibility of defendants in the Alexandria Division, of local hostility toward their activities in Leesburg, of intensive recruiting and literature sales at shopping malls, National and Dulles airports, house-by-house solicitations and phone calls in the Alexandria Division. They moved for individual *voir*

dire by counsel. They moved the court to use a preliminary written questionnaire for prospective jurors. They filed a motion for permission to submit specific questions to be asked of prospective jurors citing a list with description of 65 news articles exemplifying the inflammatory prejudicial coverage of defendants. They requested additional peremptory challenges in view of the nature of the case and number of defendants. But on November 10, eleven days before trial, the court peremptorily denied all jury selection motions except the request to submit specific questions. Defendants thereafter submitted 50 detailed proposed *voir dire* questions. The court rejected them, conducted the entire *voir dire* itself without permitting counsel to ask any question of the jurors, and proceeded to impanel a jury with no probing for prejudice.

The entire *voir dire*, reported in 38 pages, can be read in less than thirty minutes. (A. 116-146) Eight jurors who sat on the case never answered a question except by their silence during the short *voir dire*. The complete inquiry within their hearing is covered by 13 pages of transcript. (A. 116-118, 139-146, 150-151) During this time, they saw and heard seven prospective jurors say in open court that they had an adverse opinion of defendants caused by what they had heard or read about defendants. The jurors then saw eight more excused after saying they had read, heard or seen something about the case, including a Secret Service agent who prepared demonstrative evidence for this case.

The 18 persons who acknowledged reading, hearing or seeing something about the case were individually questioned briefly as to whether what they heard or read created prejudice. This required some 25 pages of transcript. Most described media coverage, or personal confrontations with LaRouche supporters, that was unrelated to the case on trial, demonstrating they had not understood the court's question,

and nine were excused for holding an adverse opinion that they did not reveal in response to the first question.

The 18 prospective jurors' who were cursorily examined showed a range of knowledge about, and some contact with, defendants. One remembered a personal confrontation with political organizers who were promoting LaRouche's candidacy at a public forum. No juror was asked about campaigning, fundraising, or literature sales activity associated with the LaRouche political movement. None were even asked if they knew any defendant or any associate of the defendants. Several mentioned reading about controversy involving the defendants in Loudoun County. Other jurors were never questioned about this. One volunteered a serious aversion to defendants' brand of politics. Other jurors were never questioned about their opinion of defendants' political views or tactics. One volunteered that he found it hard to accept the reported statement by LaRouche that he had no income. Other jurors were not questioned on this frequently reported subject.

One juror said her husband, a retired FBI agent, mentioned the *Washington Post* story of the day before the trial and observed she might be on the jury. There was no follow-up on their conversation. When told her husband was a retired FBI agent, the court asked, "Would this affect your ability to be an impartial juror in this case in your opinion?" A one word answer, "No," ended the inquiry without concern for her husband's FBI duties and contacts, and she was not excused. One Justice Department employee said he read clippings about LaRouche as they came across his desk as part of his duties. There was no follow-up and he was not excused. Defendants were compelled to use two of their ten peremptory challenges on those two persons who should have been excused for cause.

Eleven of the 31 prospective jurors who remained after the question concerning publicity revealed that they or imme-

diate family members worked or had worked for law enforcement agencies, including the DEA, the Department of Justice, three with the FBI, two with the CIA, Department of Labor, Department of State in security, and two with the IRS. One CIA employee was excused after stating, in the presence of the remaining panel, that he had extensive dealings with the FBI and DEA and could not be impartial. (A. 144-145) Other government employees among prospective jurors, as revealed by juror information cards, worked for the Department of Defense, the Defense Intelligence Agency and the Department of Agriculture. Among the twelve jurors who served, three were federal government employees. Another was the wife of a Navy engineer. Two jurors worked for defense contractors. *See*, Appeal Brief, *supra* at p. 32.

The Department of Agriculture employee, Buster Horton, became the jury foreman. He worked in the emergency personnel unit with direct liaison responsibilities to the Federal Emergency Management Agency ("FEMA"). FEMA policies had been strongly denounced by Petitioner LaRouche as part of a "secret government" apparatus which was undermining our Constitution, yet defendants never knew of Horton's FEMA involvement until after the trial, since jurors were not questioned about the nature of their employment. *See*, Appeal Brief, *supra* at p. 32-33. The court later explained his view of *voir dire* to defense counsel by stating: "[Y]ou know and I know that all this business about uncovering bias is just a smokescreen . . . for really selling your case to the jury." *See*, Appeal Brief, *supra* at p. 35.

Most jurors were simply not responding to the few and general questions asked by the court. Without any response from which an evaluation of potential prejudice could be made, the court qualified eight persons who remained silent throughout the *voir dire*. Others qualified if they stated, in response to a conclusory question, they could be fair.

Seven defendants were forced to divide the statutory minimum ten peremptory challenges with no rational basis for deciding how they should be exercised, except to strike FBI and Department of Justice employees, who were unexamined, because of their employment, and to react to subjective impressions about others. The court afforded the defense ten minutes to evaluate the remaining pool before forcing them to exercise their limited strikes. By guessing, defendants used all of their peremptory challenges except one, which they were forced to reserve to avoid the seating of an FBI employee who would have been reached if the government exercised one additional peremptory challenge. Finally, the court denied defendants' post-trial motion to interview jurors, thus foreclosing defendants' ability to ever uncover animus, potential prejudice or motive to convict that was not revealed during the perfunctory *voir dire*.

III. The Order Prohibiting Presentation of a Defense

Eighteen months prior to the indictment, on April 20, 1987, the United States, acting through the same U.S. Attorney's Office that prosecuted this case, was the sole petitioner in a U.S. Bankruptcy court action seeking to place into involuntary bankruptcy the three companies that were the debtors on the loans that were the basis for the indictment. The government obtained an order, in an extraordinary *ex parte* proceeding, appointing interim trustees who were directed to seize the assets of the three companies, run their businesses, and refrain from paying any debts other than as approved by the court. The interim trustees, aided by U.S. Marshals, padlocked the offices of the companies in a widely-publicized early dawn seizure the next day. As of the time of this trial, the interim trustees continued to control the companies, no payments had been made on corporate loans, and no business activity had been conducted since the day of the seizure. In October 1989, ten months after the jury

verdict in this case, the government's bankruptcy petitions were dismissed on the grounds, *inter alia*, that they had been brought by the United States in "bad faith." *In re Caucus Distributors, Inc., et al.*, 106 B.R. 890, at 926 (1989).

On November 7, 1988, the date that all pretrial motions were due in this case, the government filed, and served by mail, a motion *in limine* seeking to preclude the defense from introducing any evidence of the government's involvement in the involuntary bankruptcy proceedings. (A. 196) In addition, the government sought to exclude any evidence with respect to: (1) prior FBI investigations, infiltrations, and use of informants against defendants and their associates; (2) Petitioners' claims that the government, through the FBI, CIA, and others, had engaged in a 17-year pattern of harassment and persecution of them; and (3) Petitioners' claim that their inability to repay the loans they were charged with having fraudulently obtained was due to the government's "financial warfare."

The government's motion *in limine* was received by defendants on November 9, 1988, the day before argument was to be heard on all motions, without any prior notice such a motion would be filed. A written response to the motion and adequate preparation for oral argument were impossible under the circumstances. On the following day, several counsel for Petitioners argued to the court the relevance of the evidence the government sought to exclude, and contended that the government's motion was inappropriate, since a determination of the evidentiary issues raised by the motion would depend on the specific purpose for which a particular item of evidence was to be introduced. Defendants also requested that the court defer ruling on the bankruptcy aspect of the government's motion due to insufficient time to review and evaluate its ramifications.

The court refused to defer ruling, and issued an order the same day granting the motion in all significant respects.

The court did not rule that evidence of the government's involvement in the bankruptcy proceedings was irrelevant. Instead, it barred the introduction of such evidence based on Fed. R. Evid. 403, holding that admission of the evidence would necessitate inquiry into the government's claims underlying the bankruptcy filing and "would divert the jury from the issues." (A. 241)

The court also prohibited the introduction of evidence of government activities directed against defendants and their associates, only permitting defendants to "show that there were unexpected actions by some outside influence, including the government, which had the effect of frustrating [Petitioners'] expectation that repayment would be made." Even with respect to this limited class of evidence held to be admissible, the court prohibited, again pursuant to Rule 403, "delving into any details." (A. 242) The court simultaneously denied discovery requests and quashed a subpoena to the FBI for documents believed to be exculpatory, thereby denying defendants access to evidence to substantiate their defense. Defendants' 182 requests for exculpatory evidence specifically sought evidence of government interference with the ability to repay loans.

While the court stated "this ruling is not written in stone," it made it clear from the start of the trial that it intended to fully enforce its exclusionary ruling. During the opening statement of Petitioner LaRouche's counsel, an objection was sustained to certain statements arguably touching areas excluded by the *in limine* order. When counsel then stated that "[i]n any event, we'll save that for the evidence," the court retorted: "I don't want to mislead you that that will be included in the evidence either." On numerous occasions, the government's objections to evidence on the basis of the *in limine* order were sustained. *See*, Petitioner's Fourth Circuit Joint Appendix on Appeal at pages 1089, 1101, 1597, 1600-01.

The excluded evidence was critical to defend against the charges. A key government contention was that the defendants borrowed money when they knew that repayment could not be made and, central to the defense of this charge was the defendants' contention that failure of repayment was due to wrongful acts by the United States itself, over which the defendants had no control. Defendants were able to prove extensive repayments before the bankruptcy, produced evidence that the loan situation was being brought under control, and sought to show that the government's improper involuntary bankruptcy action against the borrower companies prevented further repayment of the outstanding loans. The *in limine* order prevented defendants from presenting this defense to the jury.

The devastating effect of the court's *in limine* order was also magnified by the time constraints imposed on the Petitioners by the rush to trial. When notice of the court's ruling was received, Petitioners had ten days to prepare a defense taking into account the restrictions imposed by the court which eviscerated their true defense. In view of the monumental number of tasks that had to be done in the short time remaining before trial, defense counsel could not continue preparing their trial strategy as if the *in limine* ruling had never occurred, either in the hope that the court could be convinced to modify its ruling at trial or in order to fill the record with examples of unsuccessful attempts to introduce prohibited categories of evidence.

IV. Summary of Trial and Appeal

The trial began on November 21, 1988. After presenting 30 witnesses in ten trial days, the government rested on December 7, 1988. Defendants called 23 witnesses in three trial days. No defendant testified. The jury returned guilty verdicts against all defendants on all counts after less than

12 hours of deliberations on December 16, 1988. Shortly thereafter, the indictment in Boston was dismissed on the government's motion.

On appeal, defendants argued *inter alia*, that they were denied their constitutional right to prepare their defense before trial by being forced to trial 35 days after arraignment, that they were denied exculpatory evidence in the government's possession, that they were prohibited from presenting their defense to the jury—that government misconduct interfered with their ability to repay loans—in violation of a constitutional right and that they were denied their right to trial by a fair and impartial jury by a totally inadequate jury selection process.

Appeal was argued before a panel of the United States Court of Appeals for the Fourth Circuit on October 6, 1989. On January 20, 1990, the Court of Appeals, finding "no infirmities in the proceedings in the district court", affirmed the convictions and sentences. (A. 36)

On the issues presented here, the Court of Appeals held that the district court did not abuse its discretion in denying a continuance and appellants showed no specific injury resulting from inadequate time to prepare. It held that appellants waived objection to the adequacy of the *voir dire* and that the trial court did not abuse its discretion by the manner in which *voir dire* was conducted. The Court of Appeals further ruled the trial court did not abuse its discretion in prohibiting evidence by its order *in limine* under Fed. R. Evid. 403.

Petitioners' request for rehearing *in banc* was denied on February 16, 1990.

REASONS FOR GRANTING THE WRIT

Every appearance of the record suggests there was no intention of providing these internationally controversial defendants a fair trial. The selection of the forum, an enclave of federal employee presence with a nationally proclaimed "rocket docket," when a major retrial was already scheduled in Boston two-and-one-half months hence, could only be construed as forum shopping. Arbitrarily setting a trial date at arraignment only 35 days away and a complete pretrial schedule for discovery and motions after two years of grand jury presentations, when some defendants had not yet retained counsel in a major complex case, meant there would be no time to prepare a defense. Selection of a jury in a fraction of a morning, without an effort to probe for prejudice, from an array laden with federal employees and saturated for years with intensely hostile publicity against defendants which directly involved local residents and attacks by defendants on the government policies, meant no fair and impartial jury could be secured. An order barring defense evidence of the government's actions preventing the repayment of loans through a bad faith seizure of the concerned corporations via involuntary bankruptcy petitions, as well as the harassment of defendants and their political contributors and lenders, while simultaneously denying all discovery of exculpatory evidence from the government without hearing or inquiry, meant no defense would be allowed.

The appearance perfectly matched the fact. Defendants and counsel were unable to prepare for trial. The jury was unprobed, despite having been saturated with inflammatory prejudicial publicity against defendants for years. The jury was fored by a Department of Agriculture employee with sensitive liaison responsibilities for the government's emergency planning agency, FEMA, which defendants had publicly exposed as destructive of constitutional government. Defendants, who had repaid hundreds of thousands of dollars

in political loans before the bankruptcy seizure, were not permitted to present evidence that the United States caused their inability to repay the loans for which they were indicted.

During the mere two months from indictment through motions and trial to conviction, there was not a single prosecutorial or judicial utterance or act seeking to justify this rush to judgment. Neither did the Fourth Circuit ever express concern with any aspect of the procedure followed by the district court. The rush to trial, the perfunctory jury selection process, and the pretrial curtailment of defense does not appear to have alarmed any member of that court. It is thus important that this Court review this case to ensure that what happened below does not send a message to the Fourth Circuit or other circuits, that the fair trial rights of defendants can be eroded in the name of judicial efficiency. The Fourth Circuit has chosen to endorse the "rocket docket" of the Eastern District of Virginia, and this Court should grant a writ of *certiorari* to let it and other circuits know that this approach is not consonant with the Fifth and Six Amendments.

I. Defendants Were Denied Adequate Time To Prepare Their Defense

After four-and-one-half years of nationwide investigation employing hundreds of federal agents, and two years of grand jury presentations in Alexandria, seven defendants were afforded from one to five days more than the 30 days which the Speedy Trial Act guarantees for preparation of a defense in even the simplest case. Here, defendants had to prepare to defend two conspiracies in 13 counts alleging 121 overt acts. As noted above, the government listed 53 witnesses, turned over nine file drawers of Rule 16 documents, 1,500 pages of *Jencks* materials, 693 trial exhibits, 107 audio and six video tapes to defendants in the days before trial, all of which needed to be reviewed. Under the time constraints imposed,

it was simply impossible to adequately perform all of the necessary tasks.

The pleas of counsel for an additional 60 days or less to prepare a defense, their passionate protestations that they could not provide effective assistance, and their dire prediction of inevitable convictions if more time was not afforded, ring from the transcript. Giving no reason, other than a conclusory and misleading reference to counsels' prior involvement, the district court denied their repeated motions for continuance. The Court of Appeals rejected their application for *mandamus*. They were forced to trial over announcements that they were not ready.

As was stated in *United States v. Rojas-Contreras*, 474 U.S. 231, 240-241 (1985) (Blackmun and Brennan, JJ, concurring):

> The constitutional right to effective assistance of counsel is rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. . . . The Speedy Trial Act assures a defendant will be brought to trial quickly, but without undermining the Constitution's guarantee of effective assistance of counsel.

In cases of far less complexity across the country, defendants are not forced to trial with such an impossibly short time to prepare. In the simplest case, few federal districts set trials as quickly as five weeks from arraignment. Even when defendants are in pretrial custody and trials are given priority, most defendants wait for months before trial. The appearance of ulterior motive by the government is reinforced here where defendants were engaged in controversial and often confrontational political activity, with one defendant being a candidate for President on the ballot in 20 states with the election only three weeks after the indictment, and where a major retrial

in Boston of two principal defendants was scheduled two-and-one-half months after this indictment was issued.

The trial court admitted as early as October 28 that he was "pushing defendants a little hard on this case on time." He must have known he was actually denying them a reasonable opportunity to prepare. While making the misleading statement that "most" of the defendants and their counsel had been involved in this case long before the indictment, the trial judge never acknowledged that the seven separate counsel had to be prepared to defend seven individual defendants against *these particular charges* in the short time afforded. There is no surer way to create the appearance of an intention to deny due process to secure a conviction than to arbitrarily rush to trial without any consideration being given to the right to an adequate defense.

This was not merely a case where a myopic insistence upon expeditiousness rendered the right to defend with counsel an empty formality. *See, Ungar v. Sarafite*, 376 U.S. 575, 579 (1964). Under the circumstance, it was obvious defendants would not receive the effective assistance of counsel. *See, United States v. Cronic*, 466 U.S. 648 (1984). Comparison with the Boston trial where jurors unanimously believed the defendants not guilty, under circumstances in which the district court afforded defendants substantial time to prepare, conducted a careful *voir dire* to ensure a fair and impartial jury, and gave careful consideration to the defenses raised by defendants, suggests the overwhelming prejudice to defendants of this unreasoning and arbitrary rush to trial. *See, Morris v. Slappy*, 461 U.S. 1 (1982). Only reference to an earlier tragic miscarriage of justice is adequate to capture what happened here:

> "a defendant charged with a serious crime, must not be stripped of his rights to have sufficient time to advise with counsel and prepare his defense. To do

> that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

The Fourth Circuit's affirmance of the district court's refusal to grant a continuance was largely grounded on the fact that the defendants remained silent when the trial date was set at arraignment, and did not move for a continuance until November 4—18 days later. Under the Fourth Circuit's ruling, if a defendant fails to move for a continuance at or near the time of arraignment, he risks being found tardy even if a later substantiated motion for continuance is filed. As a result, counsel faced with an apparent insufficiency of time to prepare for trial is forced to immediately file an unsupported motion for continuance, which will likely be viewed by the Court as a mere "knee-jerk" reaction and thus denied. In such a "Catch 22" situation, a defendant's constitutional right to effective assistance of counsel is rendered meaningless. This Court should review this case to ensure that future defendants in the Fourth Circuit are not put in a position where they are forced to file a motion for continuance before they can adequately support it, on pains of being found tardy if they wait until they can adquately document the grounds for their motion.

II. Defendants Were Denied A Fair And Impartial Jury

Rarely have any defendants gone on trial in the United States in the wake of years of such intensive and pervasive prejudicial pretrial publicity as was present here. The media had become habituated to referring to defendants and their associates in the most hateful phrases available: "anti-Semitic leader"; "political cults"; "small time Hitler"; "violent people." Much of the publicity was focused on the area where prospective jurors lived: "LaRouche Arouses Fear in Virginia"; "hundreds in Loudoun assisted investigation."

The district court was presented with extensive samples of four years of hateful media reporting about defendants. It proceeded to perfunctorily *voir dire* the prospective jurors in a way that avoided nearly any disclosure of prejudicial media exposure and generally avoided any juror response whatever. Eight jurors, as part of the array, were asked only nine questions and responded to none. Six of the nine questions elicited no response from any venireman.

Only two questions were addressed to the array which in any way dealt with prejudicial pretrial publicity. First, jurors were asked whether anything they had read, seen or heard about defendants caused them to form an adverse opinion. Second, they were asked whether they had read, seen or heard anything about the case. Seven jurors of 47 were excused after stating, in the hearing of all, that they had formed an adverse opinion. Eighteen answered the second question affirmatively and were individually questioned briefly at the bench. Nine were excused after revealing a variety of prejudicial matters, most having nothing to do with the charges in the case.

While 25 of 47 prospective jurors volunteered knowing something about defendants and 15 were excused, in the face of the enormously prejudicial pretrial publicity the court never asked the remaining jurors, all of whom had remained silent, a single follow-up question, individually or collectively, to discover whether they had heard something about defendants and might be prejudiced by it. There was not only no effort to probe, the court asked questions in a way that caused prospective jurors not to answer. In a matter of minutes a jury was impanelled with no effort to assure impartiality in a case of extreme pretrial publicity and notoriety.

In the Boston trial, Judge Robert Keeton spent 12 court days selecting a jury, utilizing a juror questionnaire and con-

ducting careful *voir dire* with participation by counsel. In *Irvin v. Dowd*, 366 U.S. 717, 727 (1961), there were 2,783 pages of transcript covering jury selection. Here, eight jurors' exposure to questions is covered in 13 pages, and 38 pages report the entire *voir dire*. Since most jurors never answered a single question, it cannot be argued the trial court could judge "demeanor evidence and response to questions" to determine impartiality. *See*, *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). Thus, the discretion which would normally be granted to the district court in its selection of a jury cannot serve to uphold the selection process here.

On the few occasions when a juror's response indicated potential prejudice, the court, without exception, qualified each one who expressed the opinion that he could be fair, without asking a single probing follow-up question. This made the procedure worthless as a means of selecting impartial jurors. *See*, *Rosales-Lopez v. United States*, 451 U.S. 182, 203 n.8 (1981) (Stevens, Brennan, and Marshall, JJ, dissenting).

To date, Courts of Appeals have assumed a judicial obligation to use procedures providing a reasonable assurance that prejudice will be detected if present. They have recognized the inadequacy of general inquiries about impartiality, and the inadequacies inherent in expecting a venireman to assess and confess his own bias. *See*, *e.g.*, *Jordan v. Lippman*, 763 F.2d 1265, 1281 n.19 (11th Cir. 1985); *United States v. Whitt*, 718 F.2d 1494, 1497 n.3 (10th Cir. 1983); *United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980); *Beard v. Mitchell*, 604 F.2d 485, 501 (7th Cir. 1979); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977); *Silverthorne v. United States*, 400 F.2d 627, 637-38 (9th Cir. 1968). Where there is sufficient prejudicial pretrial publicity, they have recognized the necessity of conducting individual *voir dire*. *E.g.*, *Silverthorne*, *supra* at 639.

To hold, as the Fourth Circuit did, that defendants waived any objection they might have to the *voir dire* is to

reward the district court's indifference, at best, to trial by impartial jury. The court refused to conduct individual *voir dire*, to permit counsel familiar with the case to conduct *voir dire*, to probe prospective jurors about prejudicial pretrial publicity, to use a questionnaire to develop background information, or to use the many questions defendants proferred. Counsel did everything they could to secure fair jury selection, only to see the trial court completely ignore their requests. Experienced defense counsel, including three attorneys who observed three weeks of *voir dire* in the Boston trial, knew their clients were being denied a fair jury and saw their every effort to probe for prejudice summarily rejected.

The court, among other abuses in jury selection, refused to excuse an FBI employee, a Department of Justice employee and the wife of a retired FBI agent for cause. Defendants were forced to use peremptory challenges for two and reserve their final challenge to prevent the seating of an FBI employee in the event the government used a challenge to remove the only intervening venireman. Under the exceptional circumstances of this case, it was error not to excuse these three veniremen for cause. Each of the three falls within the "implied bias" doctrine. *See*, *McDonough Power Equipment v. Greenwood*, 464, U.S. 548, 556-67, 558 (1984) (Blackmun, O'Connor, and Stevens, JJ concurring)(Brennan and Marshall, JJ, dissenting). *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

This Court has emphasized:

> "[v]*oir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and

evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, *supra* at 188.

If the jury selection process in this case withstands constitutional scrutiny, the "critical function" played by *voir dire* is negated, and federal jurors nationwide can be chosen in a matter of minutes by asking a handful of mechanical questions in cases involving the most controversial defendants. Only prospective jurors willing to aggressively assert prejudice will be excused.

III. Defendants Were Denied The Right To Present Their Defense

Probably the most traumatic moment in the short history of these shocking proceedings from indictment to conviction was the district court's granting of the government's motion *in limine* the day after defendants received it. Defendants had no opportunity to file a written response, and only a limited opportunity to address the motion, among eight others the court permitted defendants to argue.

Once the corporations which owed the debts were seized by the United States' unprecedented use of the involuntary bankruptcy process, repayment was legally precluded, yet defendants were prevented from developing this defense before the jury. In addition, the defendants intended to present evidence that the government had acted to cause contributors and lenders to cease their relationship with defendants and their associates, yet the court again curtailed this defense. However, since it is relevant to a charge of securing loans by fraud with the intention of not repaying them to show that the ability to repay was frustrated by the government or others, the defendants were entitled to have the jury consider such evidence.

The district court had no basis for denying defendants the right to present these defenses and show government interference except for its prejudgment. Only when evidence was offered could the court determine its relevance or whether Rule 403 balancing should result in its exclusion, yet, the court ruled out whole categories of evidence by its pretrial order. The injury to defendants was further compounded when the court denied their motion for relevant evidence in the government's possession which would have demonstrated the government's interference with defendants' fundraising, sales and/or other political activities.

The basis for this important Sixth Amendment right to present a defense is described in a famous case involving a President of the United States, a first among equals before the law:

> ". . . The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 709 (1974)

Here, the trial court's consistent desire to elevate speed and docket control over the rights of criminal defendants meant it equated critical defense evidence with mere diversions whenever such evidence threatened to slow down the rapid pace of trial, and the Court of Appeals likewise considers such matters to be "distractions." (A. 21-22) The manner in which the district court shackled the Petitioners in the instant case is particularly egregious because, rather than finding that the evidence at issue was irrelevant, it utilized F.R. Evid. 403 to exclude much of the evidence.

In our system the jury, not the judge, is the trier of fact. It is not the function of the judge to pre-screen the defense case so that the jury only hears what the court deems credible or appropriate. While the prosecution argued that the defendants' claim of government harassment was merely a "smokescreen" and just "the latest excuse" for non-payment of the loans, those were matters for the jury to decide. As this Court stated in *Washington v. Texas*, 388 U.S. 14 (1967), the right to present a defense includes "the right to present the defendant's version of the facts as well as the prosecution's to the jury *so it may decide where the truth lies.*" *Id.* at 19 (emphasis supplied).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

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